

United States[✓]
Circuit Court of Appeals
For the Ninth Circuit.

MARIE GAZZERA and A. GAZZERA,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States
District Court of the Northern District of
California, First Division.

FILED
APR 11 1925
F. O. MONAGHAN
Clerk

United States
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

For Defendants and Plaintiff in Error:

EDGAR D. PEIXOTTO, Esq., and T. T. CALI-
FRO, Esq., San Francisco, Cal.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Fran-
cisco.

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia.

Clerk's Office.

No. 15,840.

UNITED STATES OF AMERICA

vs.

Mrs. MARIE GAZZERA, A. GAZZERA.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please prepare transcript on appeal to in-
clude the following papers and records:

Nov. 14th, 1924. Information.

Nov. 14th, 1924. Minutes on arraignment and
plea.

Feb. 9th, 1924. Minutes on trial and verdict.

Feb. 10th, 1924. Minutes on trial and verdict.

Feb. 13 Motion for new trial and

- 14 Denial of new trial.
- 17 Motion of arrest of judgment and order denying.
- 17 Minutes on judgment and judgment.
- 20 Petition for writ of error.
 - Order allowing writ of error.
 - Assignment of errors.
 - Cost bond on appeal.
 - Bill of exceptions.

EDGAR D. PEIXOTTO and
T. J. CALIFRO,

Attorneys for Defendants.

[Endorsed]: Filed Mar. 5th, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZZERA and HECTOR VALENTINO,
Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

INFORMATION.

At the November term of said Court, in the year of our Lord one thousand nine hundred and twenty-four.

BE IT REMEMBERED that Sterling Carr, United States Attorney for the Northern District of California, by and through Kenneth C. Gillis, Special Assistant to the United States Attorney, for the United States in its behalf prosecutes in his own proper person, comes into court on this, the — day of November, 1924, and with leave of the said court first having been had and obtained, gives the court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents; THAT Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZERA, and HECTOR VALENTINO, hereinafter called the defendants, heretofore, to wit, on or about the 4th day of November, 1924, at 847 Montgomery Street, in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this [2] Court, then and there being, did then and there wilfully and unlawfully main-

tain a common nuisance in that the said defendants did then and there wilfully and unlawfully keep for sale on the premises aforesaid certain intoxicating liquor, to wit: 2 ounces of red wine, 2 glasses of white wine, and 1 pint bottle part full of white wine, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NO, THEREFORE, your informant presents: THAT Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZERA, and HECTOR VALENTINO, here-

inafter called the defendants, heretofore, to wit, on or about the 4th day of November, 1924, at 847 Montgomery Street, in the city and county of San Francisco in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there wilfully [3] and unlawfully possess certain intoxicating liquor, to wit: 2 ounces of red wine, 2 glasses of white wine, and 1 pint bottle part full of white wine, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

STERLING CARR,

United States Attorney.

KENNETH C. GILLIS,

Special Asst. to the United States Attorney. [4]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

L. T. Plant, being first duly sworn, deposes and says: That Mrs. Marie Gazzera, *alias* Grosso, A.

Gazera and Hector Valentino, on or about the 4th day of November, 1924, at 847 Montgomery St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there maintain a common nuisance in that the said defendants did then and there keep for sale on the premises at 847 Montgomery St., aforesaid certain intoxicating liquor, to wit: 2 ounces of red wine, 2 glasses of white wine and 1 pint bottle part full of white wine, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: That Mrs. Marie Gazzera, *alias* Grosso, A. Gazera, and Hector Valentino, on or about the 4th day of November, 1924, at 847 Montgomery St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there possess certain intoxicating liquor, to wit: 2 ounces of red wine, 2 glasses of white wine, and 1 pint bottle part full of white wine, then and there containing one-half of one per cent

or more of alcohol [5] by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

L. T. PLANT.

Subscribed and sworn to before me this 14 day of November, 1924.

[Seal]

T. L. BALDWIN,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 14, 1924. Walter B. Maling, Clerk. Lyle S. Morris, Deputy Clerk. [6]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Friday, the fourteenth day of November, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 15,840.

UNITED STATES OF AMERICA

vs.

Mrs. MARIE GAZZERA, A. GAZZERA and HECTOR VALENTINO.

MINUTES OF COURT—NOVEMBER 14, 1924—
ARRAIGNMENT AND PLEA.

Defendants were present with attorney. R. M. Ford, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Defendants were arraigned and each plead "Not Guilty" to information. Ordered case continued to Nov. 15, 1924, to be set for trial.

Page 218, Vol. 64. [7]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday the ninth day of February, in the year of our Lord one thousand nine hundred and twenty-five. Present: the Honorable R. S. BEAN, District Judge.

No. 15,840.

UNITED STATES OF AMERICA

vs.

Mrs. MARIE GAZZERA, *alias* GROSSO, A.
GAZERA, and HECTOR VALENTINO.

MINUTES OF COURT—FEBRUARY 9, 1925—
TRIAL.

This case came on regularly for trial. Defendants Mrs. Marie Gazzera and A. Gazzera, who were

present with attorney, T. T. Califro, Esq. R. M. Ford, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that the jury-box be filled from regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly drawn by lot, sworn, examined and accepted, were duly sworn as jurors to try issues herein, viz.:

Frank W. Trower,	E. A. Randlett,
Geo. R. Armstrong,	D. Edward Collins,
Paul Wormser,	A. S. Weaver,
Geo. A. McKean,	Henry E. Tauer,
Henry M. Abrams,	J. Allee,
Walter L. Glenn,	Henry C. Golcher.

Mr. Ford called certain persons, who were duly sworn and examined on behalf of United States, viz.: Wm. Glynn, L. T. Plant and R. F. Love; and introduced in evidence on behalf of United States certain exhibits which were filed and marked U. S. Exhibits Nos. 1 and 2; and [8] rested case of United States.

Mr. Califro called Mrs. Marie Gazzera (defendant) and A. Gazzera (Gazera) (defendant), each of whom was duly sworn and examined; and rested case on behalf of defendants.

Mr. Ford recalled in rebuttal on behalf of United States Wm. Glynn, who was further examined.

Mr. Califro recalled defendant A. Gazzera, who was further examined.

Case was argued by respective counsel and submitted, whereupon the Court proceeded to instruct

jury, who, after being so instructed, retired at 4:20 P. M., to deliberate upon a verdict. Attorneys for respective parties consenting, ordered that the jury herein (upon reaching verdict) may seal same in envelope retained by foreman and be discharged from custody and return in court on Feb. 10, 1925, at 10:30 A. M.

Page 27, Vol. 65. [9]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the tenth day of February, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable R. S. BEAN, District Judge.

No. 15,840.

UNITED STATES OF AMERICA

vs.

Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZZERA and HECTOR VALENTINO.

MINUTES OF COURT—FEBRUARY 10, 1925—
TRIAL.

This case came on regularly for further trial. Defendants were present with attorney, T. T. Califro, Esq., defendant Hector Valentino being in custody of U. S. Marshal R. M. Ford, Esq., Asst. U. S. Atty., was present for and on behalf of

United States. Jury heretofore impaneled and sworn to try defendant was present and complete. Said jury in answer to question of the Court, stated they had agreed upon a verdict and presented written verdict, which the Court ordered filed and recorded, viz.: "We, the jury, find as to the defendants at the Bar as follows: Mrs. Marie Gazzera, Guilty on both Counts. Hector Valentino, Guilty on both Counts. A. (Gazera) Gazzera, Guilty on Both Counts. Henry M. Abrams, Foreman."

Ordered jurors discharged from further consideration of case.

After hearing attorneys, ordered matter of judgment continued to Feb. 11, 1925. Ordered that defendants Mr. and Mrs. Gazzera go at large upon bonds heretofore given [10] for their appearance herein.

Mr. Califro made a motion for order vacating and setting aside verdict as to defendant Hector Valentino, which motion the Court ordered denied. On motion of Mr. Califro, ordered that the order heretofore entered, forfeiting bond given for appearance of defendant Hector Valentino, be and the same is hereby vacated, set aside and held for naught and that the writ of *fieri facias* be withdrawn; and that said defendant Hector Valentino stand committed and that *mittimus* issue.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA

vs.

GAZZERA.

(VERDICT.)

We, the jury, find as to the defendants at the bar as follows:

Mrs. Marie Gazzera,—Guilty on both counts.

Hector Valentino,—Guilty on both counts.

A. (Gazera) Gazzera,—Guilty on both counts.

HENRY M. ABRAMS,

Foreman.

[Endorsed]: Filed Feb. 10, 1925, at 10 o'clock and 35 minutes A. M. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [12]

In the District Court of the United States in and for the *Southern* of the Northern District of California.

No. 15,840.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZZERA, and HECTOR VALENTINO,
Defendants.

MOTION FOR ORDER VACATING VERDICT
OF JURY AND GRANTING NEW TRIAL.

The defendants in the above-entitled action do hereby move this Honorable Court for an order vacating the verdict of the jury herein and granting to the defendants and each of them a new trial for the following reasons, and each of them, materially affecting the constitutional rights of these defendants and each of them:

1. Said verdict was contrary to the evidence adduced upon the trial hereof.

2. The said evidence was insufficient to justify such verdict.

3. Said verdict was contrary to law.

4. The Court erred in his instructions to the jury and in deciding questions of law arising during the course of the trial hereof which errors were duly excepted to.

5. Accident and surprise which ordinary prudence could not have guarded against.

6. Newly discovered evidence for the defendants which they could not, with reasonable diligence, have discovered and produced at the trial.

This motion is made upon the minutes of the Court and all other records and proceedings in the above-entitled cause, and evidence, oral and documentary, to be introduced and adduced at the hearing.

Dated: San Francisco, California, February 11, 1925.

EDGARO PEIXOTTO,
T. T. CALIFRO,
Attorneys for Defendants.

[Endorsed]: Filed Feb. 13, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[13]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 14th day of February, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,840.

UNITED STATES OF AMERICA

vs.

Mrs. MARIE GAZZERA et al.

MINUTES OF COURT—FEBRUARY 14, 1925
—ORDER DENYING MOTION FOR NEW
TRIAL.

Pursuant to oral opinion of this day, IT IS ORDERED that the motion for new trial, heretofore submitted, be and same is hereby overruled

and denied, and case continued to Feb. 17, 1925, for pronouncing of judgment as to each defendant. [14]

In the District Court of the United States in and for the Southern Division of the Northern District of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZZERA, and HECTOR VALENTINO,
Defendants.

MOTION FOR ARREST OF JUDGMENT.

Now come the defendants in the above-entitled cause and respectfully move the Court to arrest and withhold judgment in the above-entitled cause, and the verdict of conviction of said defendants heretofore given and made in said cause be vacated and set aside and declared to be null and void and of no force, virtue or effect for each of the following reasons:

1. It appears on the face of the record herein that no judgment can be legally entered against these defendants, or any of them for the following reasons:

(A) The facts stated in the information on file herein and upon which said conviction was and is

based do not constitute a crime or public offense within the jurisdiction of this court;

(B) That said information does not state facts sufficient to charge these defendants, or any of them, with any crime or offense against the United States;

(C) The said information does not state facts sufficient to charge these defendants or either of them with having maintained a nuisance within the provisions of the laws of the United States;

(D) That said information does not state facts sufficient to charge these defendants, or either of them, with having possession of intoxicating liquors under the provisions of the laws of the United States; [15]

(E) That said information does not state facts sufficient to charge these defendants or any of them with any crime against the United States in this, to wit, that all and singular the matters and things which said information alleges, and which each count of said information alleges are not, nor is, or are any of said matters or things, a crime under the law or statutes of the United States of America.

2. That this Honorable Court has no jurisdiction to pass judgment upon these defendants, any or either of them, by reason of the fact that said information fails to charge these defendants or any of them with any crime against the United States; and further this Honorable Court has no jurisdiction to pass judgment upon any of these defendants by reason of the fact that the testi-

mony adduced at the trial of said cause shows and tends to show that no crime has been committed by these, either or any of the defendants.

3. That defendant, Mrs. Marie Gazzera, is married and the alleged offense took place in the presence of her husband A. Gazzera.

WHEREFORE, by reason of the premises, the said defendants pray the Honorable Court that judgment be arrested and withheld and all of the proceedings held null and void.

Dated: At San Francisco, California, February
—, 1925.

EDGARO PEIXOTTO,
T. T. CALIFRO,
Attorneys for Defendants.

[Endorsed]: Filed Feb. 17, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 17th day of February, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,840.

UNITED STATES OF AMERICA

vs.

Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZZERA (GAZZERA) and HECTOR VALENTINO.

MINUTES OF COURT—FEBRUARY 17, 1925
—JUDGMENT.

This case came on regularly this day for pronouncing of judgment upon defendants, who were present with Attorney E. D. Peixotto, Esq. R. M. Ford, Esq., Asst. U. S. Atty., was present for and on behalf of United States.

Defendants were called for judgment. Mr. Peixotto made a motion in arrest of judgment, which motion the Court ordered denied. After hearing attorneys for respective parties, ORDERED that defendant A. Gazzera (Gazzera) be imprisoned for 3 months and that defendant Hector Valentino be imprisoned for 10 days in San Francisco county jail, and ORDERED that defendant Mrs. Marie Gazzera pay fine of \$500.00 or, in default thereof, defendant be imprisoned in San Francisco county jail until fine is paid or she be otherwise discharged by due process of law; as detailed in judgment-book.

On motion of Mr. Peixotto, ordered that defendant Mrs. Marie Gazzera be released from custody upon giving new bond in sum of \$1,000.00.

Further ordered that execution of judgment be stayed for period of 10 days. [17]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,840.

THE UNITED STATES OF AMERICA

vs.

Mrs. MARIE GAZZERA, *alias* GROSSO, A. GAZZERA and HECTOR VALENTINO.

JUDGMENT ON VERDICT OF GUILTY.

Conv. Viol. National Prohibition Act.

Kenneth C. Gillis, Esq., Assistant United States Attorney, and the defendants with their counsel, came into court. The defendants were duly informed by the Court of the nature of the information filed on the 14th day of November, 1924, charging them with the crime of violating National Prohibition Act; of their arraignment and plea of not guilty; of their trial and the verdict of the jury on the 10th day of February, 1925, to wit:

“We, the jury find as to the defendants at the bar as follows:

Mrs. Marie Gazzera—Guilty on Both Counts.

Hector Valentino—Guilty on Both Counts.

A. (Gazera) Gazzero—Guilty on Both Counts.

HENRY M. ABRAMS,

Foreman.”

The defendants were then asked if they had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Mrs. Gazzero, A. Gazzero and A. Valentino having been duly convicted in this court of the crime of violating National Prohibition Act; [18]

IT IS THEREFORE ORDERED AND ADJUDGED that the said Mrs. Gazzero pay a fine in the sum of Five Hundred (\$500.00) Dollars; further ordered that in default of the payment of said fine that said defendant be imprisoned until said fine be paid or until she be otherwise discharged in due course of law. That defendant A. Gazzero be imprisoned for the period of three (3) months, and that defendant Hector Valentino be imprisoned for the period of ten (10) days; term of imprisonment to be executed upon said defendants by imprisonment in the county jail, county of San Francisco, California.

Judgment entered this 17th day of February, A. D. 1925.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [19]

In the Southern Division of the United States District Court in and for the Northern District of California.

Before the Honorable R. S. BEAN, Judge.

No. 15,840.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Mrs. MARIE GAZZERA et al.,

Defendants.

BILL OF EXCEPTIONS OF DEFENDANTS,
MRS. MARIE GAZZERA AND A. GAZZERA.

The above-entitled cause came on for trial on Monday, the 9th day of February, 1925, at 2 o'clock P. M. in the city and county of San Francisco, State of California, Robert M. Ford, Esq., Assistant United States Attorney, appearing for the plaintiff and T. T. Califro, Esq., appearing for the defendants.

At the time said case was called for trial, the attorney for the defendants announced to the Court that he was unprepared to proceed to trial for the reason that he did not know that the case would be so soon reached upon the trial calendar; that when the case was called in the morning, the Court continued it until the afternoon at 2 P. M. and in the meantime said attorney made every endeavor and used the utmost diligence to find

the defendants; that he was able to find the defendants Marie Gazzera and A. Gazzera, but he could not locate or find the defendant, Hector Valentino; whose address was unknown to the defendant Gazzera and to himself; that he used every endeavor and due diligence in attempting to locate the defendant, Hector Valentino, for the time of the trial, but by reason of the fact that said defendant had no telephone, that his place of residence was unknown to himself and the other defendants [20] and that he had no means of locating him and did not know his address or place of business, he was unable to have him in court at 2 o'clock on Monday, February 9th, 1925; that said attorney requested the Court for a continuance for this reason but the Court ordered the case to proceed to trial and forfeited the bond of the defendant Valentino and proceeded in the absence of said defendant to the trial; that said attorney did not find defendant Valentino until the evening of Monday, February 9th, when he found the defendant after defendant had come home from work; that on the morning of Tuesday, February 10th, the defendant, Hector Valentino was produced in court and this Honorable Court set aside and vacated the order forfeiting his bond.

Thereupon a jury having been impaneled and sworn to try the case; thereafter the following proceedings were had, testimony taken and evidence, oral and documentary, was introduced on behalf of the United States as follows:

TESTIMONY OF WILLIAM GLYNN, FOR
THE GOVERNMENT.

WILLIAM GLYNN, a witness called on behalf of the United States being duly sworn, testified as follows:

During the month of November I was at all times a Government Agent and especially so on November 4th, 1924; about 8:10 P. M. I had occasion to visit the premises at 847 Montgomery Street, San Francisco. We saw both of the defendants who are sitting there by the name of Gazzera and a Hector Valentino, a waiter. The two defendants were eating at the time, apparently just finishing. The place has a bar in front and a cafe in the rear of the place, a large round dining-room in the rear. The part of the premises that is the bar and the part that is the dining-room are practically one. With reference to the bar, these defendants were in the dining-room. They told me that they were the owners of the premises. Mrs. Gazzera told me, I think. I asked her after the seizure had been made if she [21] was the proprietor and she said, "Yes, me and my husband. This is my husband right out here." We seized on the table two glasses of white wine and a bottle, a pint bottle part full of wine underneath the same table. Two ounces of red wine in the glasses on the table. The wine seized was put in bottles and sent to the chemist for purpose of ascertaining what it was. Valentino was a waiter.

(Testimony of William Glynn.)

Q. Have you ever visited this place before or since?

A. Yes, I went there on several occasions.

Q. Do you know whether this place has ever been raided before?

A. Only hearsay; under different names.

Q. About how many people were in the place at the time you went in there?

A. About ten altogether.

Q. What sort of reputation has the place?

A. Well, they have been—

Mr. CALIFRO.—I object to that as being hearsay entirely.

COURT.—Charged with maintaining a nuisance, and as I understand, counsel can show the reputation of the place.

Mr. CALIFRO.—I would like to have him lay a foundation.

COURT.—At the time the alleged crime was committed.

A. At the time, we had information from the office in the form of reports on the place, and we were working on this complaint at the time, that the place was probably selling intoxicating liquors, and I went there to make an investigation from time to time, based solely on these reports on file.

Q. Do you know of your own knowledge whether one of these defendants has been arrested before for a violation of the prohibition act?

A. I asked her that night if her name wasn't Mrs. Grosso. She says, "Well, I am not discuss-

(Testimony of William Glynn.)

ing that." She was arrested under that name, Mrs. Grosso. [22]

Mr. CALIFRO.—I object as incompetent, irrelevant and immaterial.

A. Purely on her own admission.

Q. Just exactly what did she say in that regard?

A. I told her that she had been arrested before under the name of Grosso. I says, "I want your right name; I don't want this name." She says, "I am married now. This is my husband here." Not named Grosso any more, she said.

Q. Did she say what she had been arrested for—what offense? A. No, sir.

Cross-examination.

(By Mr. CALIFRO.)

Q. You say you found some wine in the possession of these defendants?

A. Not in their actual possession. It was on the table.

Q. At whose table was it?

A. There was a party of six if I remember right, three girls and three fellows sitting in there, and they had wine glasses in front of them.

COURT.—These defendants not at the table?

A. Not at the same table, your Honor. About six or eight feet away from their table, a smaller table than that other table.

Q. Not at their table?

A. Not their particular one; no, sir.

Q. Do you know who were sitting at that table?

A. One gave the name of Mary Brown. That is

(Testimony of William Glynn.)

all I know; so long as they said had purchased there, we didn't ascertain any further; we asked if they would identify the party who sold and they said they would; we brought this waiter and they all said that is the man.

Q. When you first asked them where they got it what did they say?

A. They told us immediately; they bought it here.

Q. Didn't they as a matter of fact at first refuse to say who it belonged to?

A. No, they did not refuse, no, sir.

Q. Didn't they at the same time say it belonged to them? [23]

A. Not to me, no, sir.

The COURT.—You refer to the people who were drinking?

Mr. CALIFRO.—Yes, your Honor.

A. Nor did I hear it, no, sir.

Q. Where are these people now?

A. I don't know.

Q. Did you place these people under arrest?

A. No, sir.

Q. Why?

Mr. FORD.—I believe that is immaterial.

COURT.—I suppose he can tell why he didn't place them under arrest.

A. That wasn't the system at the time. The custom at the time was to ascertain if they were purchasing on the premises, and if they were we would lock the proprietor up.

(Testimony of William Glynn.)

Q. Did you ask the proprietor if that belonged to him or if he sold it to them?

A. We asked the guests, yes.

Q. What did they say?

A. The guests said, "Why, we bought it from this waiter here," and I said—there were two waiters there; one fellow was a smaller, little fellow. We brought this Valentino over and said, "Is this the man?" "Yes, this is the man."

Q. They said they bought it from the waiter?

A. Yes, sir.

Q. They didn't but from these people?

A. They didn't say so, no, sir.

Q. What became of the wine you say you obtained there?

A. Took it to the chemist for analysis.

Q. You don't know what has become of it?

A. Not any more than any other place.

Mr. FORD.—I have it here. I will introduce it.

Q. What kind of a place did you say that was?

A. It was a bar room in front and quite a large dining-room in the [24] rear, all the same premises; all open.

COURT.—All one room?

A. Well, you may say that, your Honor. Practically one chamber.

Q. Isn't that as a matter of fact divided into two different portions?

A. Now, sir, it is all open; you can stand at the front and look all the way to the rear.

(Testimony of William Glynn.)

Q. Don't you go through a door to get from the barroom into the dining-room? A. No, sir.

Q. Was there anybody in the barroom?

A. There was one man in the barroom at the time, yes.

Q. You didn't make any—none of the agents, as far as you know, made any purchases in this place?

A. Not that I know of, no, sir.

Q. Neither yourself? A. No, sir.

Q. You didn't go in there with a search-warrant?

A. We did not, no, sir.

Redirect Examination.

(By Mr. FORD.)

Q. Was this wine in plain sight when you went in? A. Yes, was on the table.

Witness is shown a bottle No. 28,528, which he states he took to the chemist and was marked Government's Exhibit 1 for identification; also bottle No. 28,529 which he also stated he took to the chemist and marked for identification Government's Exhibit 2. I tasted this with my tongue and know it is wine. Both of these were obtained from the same people at the same table.

TESTIMONY OF L. T. PLANT, FOR THE GOVERNMENT.

L. T. PLANT, a witness called on behalf of the United States, being duly sworn, testified as follows: [25]

I am a Government Prohibition Agent and was

(Testimony of L. T. Plant.)

such on November 4th, 1924. I had occasion in company with Agent Glynn to enter the premises at 857 Montgomery Street.

Q. Who did you see there at that time?

A. The two defendants sitting there.

Q. You saw both of these defendants?

A. I did.

Q. Did you notice what they were doing at the time?

A. They were sitting at the table. They were about finished with their dinner.

Q. Were there other people in the place?

A. There was about ten people in the place.

Q. Did you at that time seize any liquor?

A. We did.

Q. What was it?

A. We seized two glasses of white wine on the table, and a glass of red wine on the table, and also a pint bottle part full of white wine under the table.

Q. And do you know what was done with this?

A. It was labeled and sealed and sent to the United States chemist.

Q. Were you ever in those premises on any former occasion? A. I have been.

Q. Did you on any such prior occasion see any violation of the law there in connection with the Prohibition Act? A. No, I can't say I did.

Q. What kind of a place is this?

A. This is a bar and restaurant and dining-room; restaurant—cafe.

(Testimony of L. T. Plant.)

Q. Who else did you see there besides these two defendants? A. Hector Valentino.

Q. What was he doing?

A. He was the waiter; he served the people at the table.

Q. Did either one of these defendants make any statement to you or in your presence with reference to the proprietorship of the premises? [26]

A. They did.

Q. What did they say?

A. Mrs. Gazzera said she was the proprietor and that was her husband; they were running the place.

Mr. CALIFRO.—We will admit that these people owned the business there.

Q. What kind of a reputation has this place?

Mr. CALIFRO.—I object to that on the same grounds as heretofore urged.

COURT.—Confine it to near that time.

Q. At or near November 4, 1924, do you know what reputation this place bore; prior thereto or immediately subsequent thereto?

A. I couldn't give you dates but we have had several complaints about the place and made investigations there.

Q. How near to this date, November 4th, was it, approximately?

A. Oh, I should say inside of two or three weeks.

Q. Did you hear a conversation, or did you hear any conversation in which Mrs. Gazzera here referred to a time of a former arrest?

A. Well, we were—

(Testimony of L. T. Plant.)

Mr. CALIFRO.—I object to that on the ground it is incompetent, irrelevant and immaterial.

Q. State what was said with reference to that, if you know.

A. We asked her her name and she gave us Mrs. Gazzera. I asked her if her name was Grosso; she said no, she had just been married; that was her husband.

Cross-examination.

The complaints that I got about this place were from the office.

Q. What did the complaints consist of?

A. About there was bootlegging there. I can't recall if I ever conducted a raid next door. Probably I did or probably I didn't. I go to so many places. [27]

Q. Do you know who the party was that had that wine?

A. I think—well, I couldn't say. One of them gave the name of Brown; that is all I know.

Q. You don't know where it came from, do you?

A. We asked them who they got the liquor of and they said they bought it of Hector Valentino.

TESTIMONY OF R. F. LOVE, FOR THE GOVERNMENT.

R. F. LOVE, a witness called on behalf of the United States, being duly sworn, testified as follows:

I am a Government chemist. Witness is shown bottle 28528 introduced in evidence for the purpose

(Testimony of R. F. Love.)

of identification and states that he received that from Agents Taylor and Neary to determine the alcoholic contents. The result was that it contained 10.3 per cent alcohol by volume and is fit for beverage purposes and was introduced in evidence. Witness is shown bottle marked 28529 and states that as the result of his investigation it contains 8.8 per cent alcohol and is fit for beverage purposes. The bottle was introduced in evidence and marked Exhibit 2.

Government rests.

TESTIMONY OF MRS. MARIE GAZZERA, FOR DEFENDANTS.

Mrs. MARIE GAZZERA, a witness called on behalf of the defendants, being sworn, testified as follows:

I remember November 4th, 1924, the day the Government agents came to the premises. We were sitting at the table eating our dinner. Hector Valentino was sitting at the table and all the family; my husband and my son and the family when they came in.

There is a partition between the barroom and the dining-room and a door going into the dining-room.

Q. Did you give any wine to anybody in those premises that evening? A. No.

Q. Do you know whether or not Valentino did?

A. No, he did not. [28]

(Testimony of Mrs. Marie Gazzera.)

COURT.—What did you say? He did or did not? A. No, he did not.

Q. Did he say he did not?

A. Yes, he said he did not.

Q. Did he ever have your permission to sell any wine to anybody there?

A. No, sir, we didn't keep any liquor, any wine in our place.

Q. You never sold any? A. I never did.

Q. You didn't have any wine yourself?

A. No, we had beer on our table, and a glass of milk for myself.

Q. You don't sell wine there or any kind of liquor there? A. No, nothing.

Q. Did you see the agents find these bottles with anybody there?

A. No, I didn't know anything about it because there was stranger people there eating, and we didn't know what they had on the table. We were just eating and knew nothing about what they had at the table.

Q. Where were the other people sitting in that dining-room with reference to your own table?

A. We were the first table as soon as you open the door, and these people were behind us, the last table in the dining-room.

Q. About how far apart—how far away?

A. Just about from you and here; that is all.

Q. Do you know where these people came from?

A. I don't now; I know he was a doctor—that is

(Testimony of Mrs. Marie Gazzera.)

to say they came from Los Angeles. I didn't ask no questions.

Q. Why didn't you ask any questions?

Cross-examination.

When I first saw the agents I was sitting at the table. I saw three or four people come in. I never thought they were agents. I was eating dinner quietly. Hector Valentino was sitting with us and he is our waiter. Now he quit and works some other place. [29]

Q. You and your husband were the proprietors?

A. Yes, sir.

TESTIMONY OF A. GAZZERA, FOR DEFENDANTS.

A. GAZZERA, a witness called on behalf of the defendants, being duly sworn, testified as follows:

Q. Mr. Gazzera, you were the proprietor of Il Trovatore Hotel on November 4th, 1924.

A. Yes, sir.

Q. What kind of a place is that?

A. It is a dining-room with a saloon and kitchen, restaurant, hotel upstairs, rooms.

Q. When you say saloon, what do you sell there?

A. Soft drinks only; a few cigars.

Q. The saloon part, is that held for the accommodation of the guests in the dining-room?

A. Yes, sir, that is all.

Q. You run kind of a boarding-house there?

A. Yes, sir.

(Testimony of A. Gazzera.)

Q. Now, do you remember when the agents came in there that evening? A. Yes, sir.

Q. And when did you first see them come in there?

A. I was sitting eating my supper. I saw three or four fellows come in the dining-room. They went over to see that table, see what they have on the table.

There is a partition between the outer room and the dining-room, it is about 10 or 12 feet high.

Q. Did you see the agents find these bottles on the premises?

A. Well, the agents came in, went to the tables; I don't know what they find. He says he find these things there, but we never sell anything.

Q. Who were sitting at the table where that came from?

A. A party of eight or ten. I forget how many there was. They said that they had come from Los Angeles. [30]

Q. You don't know their names?

A. No, I don't.

Q. Did you hear anybody say that they bought the wine from Valentino? A. No.

Q. Did you give Valentino any permission at any time to sell any wine there? A. No, sir.

Q. Did you have any liquor there?

A. Yes, sir.

Q. Do you know where Valentino is now?

A. Well, I don't know. He is working somewhere, but I haven't seen him for five or six days.

(Testimony of A. Gazzera.)

Q. Did you sell any liquor there? A. No.

Q. Did your wife sell any liquor there?

A. No.

Q. Well, how far away was that table from the tables you were sitting at?

A. Oh, about fifteen feet, the last table. We was at the first table, was last one in dining-room, about fifteen feet, eighteen feet.

Q. The dining-room has many tables in it, hasn't it? A. Yes, sir.

Q. Did you ever hear any complaints about your place? A. No, sir. [31]

Cross-examination.

When the agents came in the door from the bar-room to the dining-room was open. It is a common door. The door was open. Hector Valentino was a waiter there. He was waiting on the table during the evening. Then they came in he was waiting on the table. He waited on every table. There are about twenty-five tables in the dining-room. The people where the wine was discovered were about ten or fifteen or twenty feet the other side of us. I don't know what was doing there, because I never looked at all, because I never thought they had anything at all. If I knew it I wouldn't allow them to have anything. They were sitting at a big long table not next to me, three or four tables between.

Q. You could see very plainly what they were doing at that table?

A. I never paid any attention what was doing.

Thereupon the defendant rested.

TESTIMONY OF WILLIAM GLYNN, FOR THE
GOVERNMENT (RECALLED IN REBUT-
TAL).

WILLIAM GLYNN, recalled on behalf of the United States in rebuttal, sworn, testified as follows:

When I went to the premises that night Hector Valentino was walking around dressed as a waiter with an apron just like all waiters wear. He was right there at the table, had evidently just served them something and was walking away when we entered.

Q. What kind of glasses did you find this wine in at this table where it was found?

A. Regular wine glasses, holds about four or four and a half ounces of liquor, and it is a regular wine-shaped glass with a stem.

Cross-examination.

We took the contents out of the glasses and put them in a bottle and left the glasses there.

The foregoing is all the evidence in the case.

Thereupon the evidence was closed and there was argument to the jury. [32]

INSTRUCTIONS OF COURT TO THE JURY.
Gentlemen of the Jury:

This is another charge of violation of the National Prohibition Act. There are two counts in the *indictment*. The first charges that these two defendants, and one Valentino—and Valentino is not on trial—that the two defendants, together

with Valentino, on the 4th day of November of last year were guilty of maintaining a common nuisance, and that on the same day they had in their possession intoxicating liquors. Now a nuisance within the meaning of the Federal Prohibition Act is any place where intoxicating liquors are kept for sale or barter, and if you believe from the testimony beyond a reasonable doubt that these defendants, who are admitted to be the proprietors of this particular place, kept liquor there for sale or barter, then they were violating the prohibition law and should be convicted. If, on the other hand, you do not so believe or have a reasonable doubt upon that subject you should give them the benefit of it and an acquittal. Now, a reasonable doubt of course means simply such a doubt as would cause a reasonably prudent man to hesitate to act in his own important affairs. It doesn't mean a mere possible doubt; it doesn't mean a captious doubt. It does not mean such a doubt as a juror may conjure up in his own mind without any basis for it either based on sympathy or a reluctance to enforce the law, but it means a real substantial doubt based either upon the testimony or the want of testimony.

The second count in this *indictment* charges possession, that this wine as charged here was in their possession. Now, it is charged that this liquor was intoxicating. Intoxicating liquor as defined in the National Prohibition Act is any liquor fit for beverage purposes that contains more than one-half of one per cent alcohol by volume. You have heard the testimony with reference to the alcoholic contents of

this liquor that is involved in this case. The chemist testified that one bottle analyzed 10.3 per cent alcohol and the other 8.8 per cent, [33] and if that is true and the liquor was fit for beverage purposes, it is intoxicating within the meaning of the statute, and it is a crime for one to have it in his possession, and any place where such liquor is kept for sale or barter is a nuisance within the meaning of the statute.

Now, you have heard the evidence in this case, and it is for you to say under your oaths and under this testimony whether you believe these defendants guilty of the crime charged against them. The evidence in this case indicates that the sale in this case, if any was made, was made by the waiter. Now, if the waiter was employed by the defendants and acting for them, and within their knowledge, then they are just as guilty of a violation of the statute as if they had made the sale themselves.

The defendants have each testified in their own behalf. Apply to their testimony the same test you do to that of any other witness, giving it such weight and credit as you think it is entitled to, keeping in mind, however, in weighing their testimony, the interest that they naturally have in the result of this trial. Like all defendants in a criminal case they come before this Court and jury clothed with the presumption of innocence, and they are entitled to the benefit of that until it is overcome by the testimony. It is not for them to prove their innocence, but it is for the Government to prove their guilt,

and that to the satisfaction of the jury beyond a reasonable doubt.

Mr. FORD.—You made a statement the third defendant was not on trial. Do I understand you to mean by that the jury couldn't find a verdict against him. He is on trial; he is not in court. It is only a misdemeanor.

COURT.—It is a misdemeanor and he can be tried without his presence. If you think Valentino is guilty you can say so in your verdict. He is not compelled to be here. The case was set for trial and if he refuses or neglects to come, his guilt or innocence is to be determined the same [34] as if he were present. What I meant is he was not present.

JUROR.—If we think the liquor was brought in by these people could they be found guilty?

COURT.—If the liquor was brought in by the people using it and served by the waiter would be guilty of possession. The question of whether they were maintaining a nuisance I think that would not be sufficient to justify a verdict of a nuisance, but they would be guilty of possession, and sale. If the waiter was acting for them and with their knowledge, although he may have been dealing with somebody else's liquor.

JUROR.—Did they find other liquor there other than what was on the table?

COURT.—No evidence of it. As far as the evidence shows the liquor was found on the table and it has been introduced in evidence.

Thereafter the jury retired for deliberation and later returned to court with the following verdict:

“We, the Jury, find the defendants at the bar as follows:

Mrs. Marie Gazzera—Guilty on Both Counts.

Hector Valentino—Guilty on Both Counts.

A. (Gazera) Gazzera—Guilty on Both Counts.

HENRY M. ABRAMS,
Foreman.”

Thereupon, the Court fixed February 11th at the hour of 10 o'clock as the date and time for the imposition, sentence and judgment, at which time all the defendants were present in open court, whereupon counsel for defendants presented the following written motion for order vacating verdict of jury and granting new trial:

(Title Court and Cause.)

“The defendants in the above-entitled action do hereby move this Honorable Court for an order vacating the verdict of the jury herein and granting to the defendants and each of them a new trial for the following reasons, and each of them, materially affecting the constitutional rights of these defendants and each of them: [35]

1. Said verdict was contrary to the evidence adduced upon the trial hereof.
2. The said evidence was insufficient to justify such verdict.
3. Said verdict was contrary to law.
4. The Court erred in his instructions to the jury and in deciding questions of law arising during

the course of the trial hereof which errors were duly excepted to.

5. Accident and surprise which ordinary prudence could not have guarded against.

6. Newly discovered evidence for the defendants which they could not, with reasonable diligence, have discovered and produced at the trial.

This motion is made upon the minutes of the court and all other records and proceedings in the above-entitled cause, and evidence, oral and documentary, to be introduced and adduced at the hearing.

Dated: San Francisco, California, February 11, 1925.

EDGAR D. PEIXOTTO,

T. T. CALIFRO,

Attorneys for Defendants.”

The said motion was argued and submitted to the Court and said Court on February 14th made an order denying said motion for a new trial and set Tuesday, February 17th, at the hour of 10 o'clock A. M. for the imposition, sentence and judgment, at which time all the defendants were present in open court, whereupon counsel for defendants presented and filed the following written motion for order vacating verdict of jury and granting new trial:

(Title of Court and Cause.)

“Now come the defendants in the above-entitled cause and respectfully move the Court to arrest and withhold judgment in the above-entitled cause, and the verdict of conviction of said defendants hereto-

fore given and made in said cause be vacated and set aside and declared to be null and void and of no force, virtue or effect for each of the following reasons: [36]

1. It appears on the face of the record herein that no judgment can be legally entered against these defendants, or any of them for the following reasons:

(A) The facts stated in the information of file herein and upon which said conviction was and is based do not constitute a crime or public offense within the jurisdiction of this Court;

(B) That said information does not state facts sufficient to charge these defendants, or any of them, with any crime or offense against the United States;

(C) That said information does not state facts sufficient to charge these defendants or either of them with having maintained a nuisance within the provisions of the laws of the United States;

(D) That said information does not state facts sufficient to charge these defendants, or either of them, with having possession of intoxicating liquors under the provisions of the laws of the United States;

(E) That said information does not state facts sufficient to charge these defendants or any of them with any crime against the United States in this, to wit, that all and singular the matters and things which said information alleges, and which each count of said information alleges are not, nor is, or are any of said matters or things, a crime under the law of statutes of the United States of America.

2. That this Honorable Court has no jurisdiction to pass judgment upon these defendants, any or either of them, by reason of the fact that said information fails to charge these defendants or any of them with any crime against the United States; and further this Honorable Court has no jurisdiction to pass judgment upon any of these defendants by reason of the fact that the testimony adduced at the trial of said cause shows and tends to show that no crime has been committed by these, either or any of the defendants.

3. That defendant, Mrs. Marie Gazzera, is married and the alleged offense took place in the presence of her husband, A. Gazzera.

WHEREFORE, by reason of the premises, the said defendants [37] pray the Honorable Court that judgment be arrested and withheld and all of the proceedings held null and void.

Dated: At San Francisco, California, February 17, 1925.

EDGAR D. PEIXOTTO,
T. T. CALIFRO,
Attorneys for Defendants."

The said motion for arrest of judgment was denied by the Court and to the order denying a new trial and for arrest of judgment, defendants then and there in open court duly excepted.

Thereafter and on said 17th day of February, 1925, the following judgment on the verdict of guilty was made and entered by the Court:

(Title Court and Cause.)

JUDGMENT OF VERDICT OF GUILTY.

Kenneth C. Gillis, Esq., Assistant United States Attorney, and the defendants with their counsel came into court. The defendants were duly informed by the Court of the nature of the information filed on the 14th day of November, 1924, charging them with the crime of violating National Prohibition Act; of their arraignment and plea of not guilty; of their trial and the verdict of the jury on the 10th day of February, 1925, to wit:

We, the jury, find the defendants at the bar as follows:

Mrs. Marie Gazzera—Guilty on both counts,
Hector Valentino—Guilty on both counts,
A. (Gazera) Gazzera—Guilty on both counts,
HENRY M. ABRAMS,
Foreman.

The defendant was then asked if he had any legal cause to show why judgment should not be entered and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Mrs. Gazzera, A. Gazzera, and A. Valentino having been duly convicted in this court of the crime of violating National Prohibition Act; [38]

IT IS THEREFORE ORDERED AND ADJUDGED that the said Mrs. Gazzera pay a fine in

the sum of Five Hundred (\$500.00) Dollars; further ordered that in default of the payment of said fine that said defendant be imprisoned until said fine be paid or until she be otherwise discharged in due course of law. That defendant, A. Gazzera, be imprisoned for the period of three (3) months and that Hector Valentino be imprisoned for the period of ten (10) days. Terms of imprisonment to be executed upon said defendants by imprisonment in the county jail, county of San Francisco, California.

Judgment entered this 17th day of February, A. D. 1925.

WALTER B. MALING,
Clerk.

C. W. Calbreath,
Deputy Clerk.

The foregoing contains all the proceedings that were had and all the testimony that was taken and the substance of all evidence, oral and documentary, that was adduced at the trial of the above-entitled action.

WHEREFORE, in order that all the proceedings had upon the trial of the above-entitled cause may be preserved, the defendants, Marie Gazzera and A. Gazzera, propose the foregoing as a full and correct bill of exceptions of all the proceedings had, and of all the evidence adduced at the trial, by both the plaintiff and the defendants, and pray that the same may be settled and allowed as a bill of exceptions of such proceedings, to be used on appeal from the judgment herein.

Dated: February 20th, 1925.

EDGAR D. PEIXOTTO and
T. T. CALIFRO,

Attorneys for Defendants, Marie Gazzera and A.
Gazzera. [39]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Mrs. MARIE GAZZERA et al.,

Defendants.

PRESENTATION OF BILL OF EXCEPTIONS
AND NOTICE THEREOF.

The defendants Marie Gazzera and A. Gazzera
hereby present the foregoing as their proposed bill
of exceptions herein and respectfully ask that the
same be allowed.

EDGAR D. PEIXOTTO and
T. T. CALIFRO,

Attorneys for Defendants, Mrs. Marie Gazzera and
A. Gazzera.

To STERLING CARR, United States Attorney,
Northern District of California, and ROBERT
M. FORD, Assistant United States Attorney:

Gentlemen:

You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendants Marie Gazzera and A. Gazzera in the above-entitled cause, and that said defendants will ask for the allowance of the same.

EDGAR D. PEIXOTTO and
T. T. CALIFRO,

Attorneys for Defendants Marie Gazzera and A.
Gazzera. [40]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Mrs. MARIE GAZZERA et al.,

Defendants.

STIPULATION FOR SETTLEMENT AND AL-
LOWANCE OF BILL OF EXCEPTIONS
AND ORDER MAKING BILL OF EXCEP-
TIONS PART OF THE RECORD.

IT IS HEREBY STIPULATED that the fore-
going bill of exceptions is correct, and that the same
be settled and allowed by the Court.

Dated: March 5th, 1925.

STERLING CARR,
United States Attorney.

By ROBERT M. FORD,
Asst. United States Attorney.
EDGAR D. PEIXOTTO and
T. T. CALIFRO,

Attorneys for Defendants, Marie Gazzera and A.
Gazzera. [41]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Mrs. MARIE GAZZERA et al.,

Defendants.

CERTIFICATE OF JUDGE SETTLING BILL
OF EXCEPTIONS.

This bill of exceptions having been duly presented
to the Court and having been amended to correspond
with the facts is now signed and made a part of the
records in this cause.

Dated: March 5th, 1925.

R. S. BEAN,
Judge.

Receipt of a copy of the within bill of exceptions is hereby admitted this 20th day of February, 1925.

STERLING CARR,

U. S. Atty.,

Attorney for Plaintiff.

[Endorsed]: Lodged Feb. 20, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. Filed Mar. 5, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [42]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Mrs. MARIE GAZZERA et al.,

Defendants.

PETITION FOR WRIT OF ERROR.

Now come Marie Gazzera and A. Gazzera, two of the defendants in the above-entitled action, and bring this petition for writ of error to the Southern Division of the District Court of the United States for the Northern District of California, and in that behalf your petitioners show:

That on the 17th day of February, 1925, there was made, rendered and entered in the above-entitled

court and cause a judgment against your petitioners herein, wherein and whereby your petitioner, the said Marie Gazzera was adjudged and sentenced to the payment of a fine of Five Hundred (\$500.00) Dollars, and your petitioner, A. Gazzera, was sentenced to three (3) months in the county jail; and your petitioners show that they are advised by counsel, and they and each of them aver, that there was and is manifest error in the records and proceedings had in said cause, and in the making, rendition and entry of said judgment, and sentence to the great injury and damage of your petitioners, all of which errors will be more fully made to appear by an examination of the said record and by an examination of the bill of exceptions to be tendered and filed and in the assignments of errors presented herewith; and to that end that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a writ of error may be issued, directed therefrom to said Southern [43] Division of the District Court of the United States for the Northern District of California, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in the said cause, that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the errors, if any have happened, may be duly corrected, and full and

speedy justice done to your petitioners; and that during the pendency of this writ of error all proceedings in this court be suspended and stayed and that through the pendency of said writ of error the defendant, Marie Gazzera, be admitted to bail in the sum of One Thousand (\$1,000.00) Dollars and A. Gazzera be admitted to bail in the sum of Two Thousand (\$2,000.00) Dollars.

Dated: February 20th, 1925.

EDGAR D. PEIXOTTO and
T. T. CALIFRO,

Attorneys for Petitioners, Marie Gazzera and A. Gazzera.

Receipt of a copy of the within petition for writ of error is hereby admitted this 20th day of February, 1925.

STERLING CARR,
U. S. Atty.,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 20th, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[44]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, First Division.

No. 15,840.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Mrs. MARIE GAZZERA et al.,
Defendants.

ASSIGNMENT OF ERRORS ON BEHALF OF
DEFENDANTS, MARIE GAZZERA AND A.
GAZZERA.

Marie Gazzera and A. Gazzera, defendants in the above-entitled cause and the plaintiff in error herein, having petitioned for an order from said Court permitting them to procure a writ of error to this court directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and entered in said cause against said Marie Gazzera and A. Gazzera, the plaintiffs in error herein, now make and file with said petition the following assignment of errors herein, upon which they will rely for a reversal of said judgment and sentence upon the said writ, and which errors, and each and every of them, are to the great detriment, injury and prejudice of the said Marie Gazzera and A. Gazzera and in violation of the rights conferred upon them by law, and they say, and each of them says, that in the

record and proceedings in the above-entitled action upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error to which exceptions were duly taken in this, to wit:

I.

The Court erred in overruling and denying defendants' motion for an order vacating the verdict of the jury and granting [45] to the defendants a new trial upon the grounds in said motion taken and assigned, to wit:

"1.

Said verdict was contrary to the evidence ad-
duced upon the trial hereof.

2.

The said evidence was insufficient to justify such
verdict.

3.

Said verdict was contrary to law.

4.

The Court erred in its instructions to the jury and in deciding questions of law arising during the course of the trial hereof which errors were duly excepted to.

5.

Accident and surprise which ordinary prudence could not have guarded against.

6.

Newly discovered evidence for the defendants which they could not with reasonable diligence, have discovered and produced at the trial."

II.

The Court erred in overruling defendants' motion for arrest of judgment upon the grounds in said motion stated and assigned, to wit:

“1.

The facts stated in the information on file herein and upon which said conviction was and is based do not constitute a crime or public offense within the jurisdiction of this court.

2.

That said information does not state facts sufficient to charge these defendants, or any of them, with any crime or offense against the United States.
[46]

3.

That said information does not state facts sufficient to charge these defendants, or either of them, with having maintained a nuisance within the provisions of the laws of the United States.

4.

That said information does not state facts sufficient to charge these defendants, or either of them, with having possession of intoxicating liquors under the provisions of the laws of the United States.

5.

That said information does not state facts sufficient to charge these defendants, or any of them, with any crime against the United States in this, to wit: that all and singular the matters and things which said information alleges, and which each count of said information alleges are not,

nor is, or are any of said matters or things, a crime under the law or statutes of the United States of America.

6.

That this Honorable Court has no jurisdiction to pass judgment upon these defendants, any or either of them, by reason of the fact that said information fails to charge these defendants or any of them with any crime against the United States; and further, this Honorable Court has no jurisdiction to pass judgment upon any of these defendants by reason of the fact that the testimony adduced at the trial of said cause shows and tends to show that no crime has been committed by these, either or any of the defendants.

7.

That defendant, Mrs. Marie Gazzera, is married and the alleged offense took place in the presence of her husband A. Gazzera.”

III.

That this Honorable Court has no jurisdiction to pass judgment upon either of these defendants by reason of the fact that said [47] information failed to charge these defendants, or either of them, with any crime against the United States, and particularly of the crime of nuisance contained in the first count of said information; and further, that this Honorable Court has no jurisdiction to pass judgment upon either of these defendants by reason of the fact that the testimony introduced in the trial of said cause showed and intended to show that no crime had been committed

against the United States, as set forth in the information, and particularly under the charge of nuisance contained in the first count of said information.

IV.

That the Court erred in making, giving and rendering judgments against the defendant, or either of them, for the reason that said information does not state any crime or any offense against any law of the United States, and for the reason taken and assigned by the defendants in their motion for arrest of judgment.

V.

That the Court erred in instructing the jury as follows:

“Now a nuisance within the meaning of the Federal Prohibition Act is any place where intoxicating liquors are kept for sale or barter, and if you believe from the testimony beyond a reasonable doubt that these defendants, who are admitted to be the proprietors of this particular place, kept liquor there for sale or barter, then they were violating the prohibition law and should be convicted.”

VI.

That the Court erred in giving the following instruction:

“If it is true that the liquor was fit for beverage purposes, it is intoxicating within the meaning of the statute, and it is a crime for one to have it in his possession, and any place where such liquor

is kept for sale or barter is a nuisance within the meaning of the statute.”

VII.

That the Court erred in giving the following instruction: [48]

“The evidence in this case indicates that the sale in this case, if any was made, was made by the waiter. Now if the waiter was employed by the defendants and acting for them, and within their knowledge, then they are just as guilty of a violation of the statute as if they had made the sale themselves.”

VIII.

That the Court erred in giving the following instruction:

“The defendants have each testified in their own behalf. Apply to their testimony the same test you do to that of any other witness, giving it such weight and credit as you think it is entitled to, keeping in mind, however, in weighing their testimony, the interest that they naturally have in the result of this trial.

IX.

That the Court erred in giving the following instruction:

“JUROR.—If we think the liquor was brought in by these people could they be found guilty?

COURT.—If the liquor was brought in by the people using it and served by the waiter would be guilty of possession. The question of whether they were maintaining a nuisance I think that would not be sufficient to justify a verdict of a

nuisance, but they would be guilty of possession, and sale. If the waiter was acting for them and with their knowledge, although he may have been dealing with somebody else's liquor."

Dated: February 20th, 1925.

EDGAR D. PEIXOTTO and
T. T. CALIFRO,

Attorneys for Said Defendants, Marie Gazzera and
A. Gazzera.

Receipt of a copy of the within assignment of errors is hereby admitted this 20th day of February, 1925.

STERLING CARR,
U. S. Atty.,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 20, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [49]

In the District Court of the United States in and
for the Southern Division of the Northern
District of California.

No. 15,840.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Mrs. MARIE GAZZERA et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR AND
SUPERSEDEAS.

The writ of error and supersedeas therein prayed for by the defendants, Marie Gazzera and A. Gazzera, pending the decision upon the writ of error are hereby allowed, and said defendant, Marie Gazzera is admitted to bail upon the writ of error in the sum of one thousand (\$1,000.00) dollars, and the defendant, A. Gazzera, is admitted to bail upon the writ of error in the sum of two thousand (\$2,000.00) dollars, and the bond for costs upon the writ of error is hereby fixed in the sum of two hundred (\$200.00) dollars.

Dated: February 20, 1925.

R. S. BEAN,

District Judge of the United States for the Northern District of California.

[Endorsed]: Filed Feb. 20, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.
[50]

(BOND FOR COSTS ON WRIT OF ERROR.)

KNOW ALL MEN BY THESE PRESENTS: That we, Marie Gazzera and A. Gazzera as principals, and Jesse D. Hannah and Henry J. Gosso, as sureties, are held and firmly bound unto United States of America, in the full and just sum of Two Hundred 00/100 Dollars, to be paid to the said United States of America, to which payment, well

and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of February, in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California, in a suit depending in said court, between United States of America and Marie Gazzera and A. Gazzera, a judgment was rendered against the said Marie Gazzera and A. Gazzera and the said Marie Gazzera and A. Gazzera having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, pursuant to the terms and time fixed by said citation,—

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Marie Gazzera and A. Gazzera shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit and shall prosecute said writ of error, to effect, and answer all damages and [51] costs if they or either fail

to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. GAZZERA. (Seal)

MARIA GAZZERA. (Seal)

JESSE D. HANNAH, (Seal)

602 Cal. St., S. F.

HENRY J. GOSSO,

1118 Mtg. St., S. F.

Acknowledged before me the day and year first above written.

[Seal]

FRANCIS KRULL.

United States of America,

Northern District of California,—ss.

Jesse D. Hannah and Henry J. Gosso, being duly sworn, each for himself, deposes and says that he is a freeholder in said district, and is worth *to* sum of Two Hundred 00/100 Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

JESSE D. HANNAH.

HENRY J. GOSSO.

Subscribed and sworn to before me this — day of February, A. D. 1925.

[Seal]

FRANCIS KRULL.

[Endorsed]: Filed Feb. 25, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [52]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON WRIT OF
ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 52 pages, numbered from 1 to 52 inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States of America vs. Marie Gazzera et al., No. 15,840, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the praecipe (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of twenty dollars and ninety-five cents (\$20.95) and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error, and original citation on writ of error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of March, A. D. 1925.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [53]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to
the Honorable, the Judges of the District
Court of the United States for the Northern
District of California, Southern Division,
GREETING:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which
is in the said District Court, before you, or some
of you, between Marie Gazzera and A. Gazzera,
plaintiffs in error, and United States of America,
defendant in error, a manifest error hath hap-
pened, to the great damage of the said Marie Gaz-
zera and A. Gazzera, plaintiffs in error, as by
their complaint appears:

We, being willing that error, if any hath been,
should be duly corrected, and full and speedy jus-
tice done to the parties aforesaid in this behalf,
do command you, if judgment be therein given,
that then, under your seal, distinctly and openly,
you send the record and proceedings aforesaid,
with all things concerning the same, to the United
States Circuit Court of Appeals for the Ninth
Circuit, together with this writ, so that you have
same at the city of San Francisco, in the State of
California, within thirty days from the date hereof,
in the said Circuit Court of Appeals, to be then
and there held, that, the record and proceedings
aforesaid being inspected, the said Circuit Court

of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 20th day of February, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk of the United States District Court.

By C. W. Calbreath,
Deputy Clerk.

Allowed by:

R. S. BEAN,
Judge.

[Endorsed]: No. 15,840. United States District Court for the Northern District of California, Southern Division. Marie Gazzera and A. Gazzera, Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Feb. 21, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [54]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the

United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 21st day of February, A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal]

WALTER B. MALING,
Clerk U. S. District Court, Northern Dist. of California.

By C. M. Taylor,
Deputy Clerk. [55]

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Marie Gazzera and A. Gazzera are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable R. S. BEAN, United States District Judge for the Northern District of California, this 20th day of February, A. D. 1925.

R. S. BEAN,

United States District Judge.

Received copies of order allowing writ of error and citation on writ of error the 21st day of February, 1925.

STERLING CARR,
U. S. Atty.,
T.

United States Attorney.

[Endorsed]: No. 15,840. United States District Court for the Northern District of California, Southern Division. Marie Gazzera and A. Gazzera, Plaintiffs in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Feb. 24, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [56]

[Endorsed]: No. 4529. United States Circuit Court of Appeals for the Ninth Circuit. Marie Gazzera and A. Gazzera, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District

Court of the Northern District of California, First
Division.

Filed March 17, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.